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11

12 IN THE UNITED STATES DISTRICT COURT
13 FOR THE NORTHERN DISTRICT OF CALIFORNIA
14 SAN FRANCISCO AND OAKLAND DIVISION

15 THOMAS FERNANDEZ, LORA SMITH, and) Case No. C-06-07339 CW
16 TOSHA THOMAS, individually and on behalf)
of a class of all other persons similarly situated,)
17 Plaintiffs,) **PLAINTIFFS' NOTICE OF MOTION**
vs.) **AND MOTION FOR FINAL**
18 K-M INDUSTRIES HOLDING CO., INC.;) **APPROVAL OF CLASS ACTION**
K-M INDUSTRIES HOLDING CO., INC.) **SETTLEMENT, AWARD OF**
ESOP PLAN COMMITTEE; WILLIAM E.) **ATTORNEYS' FEES AND COSTS, AND**
AND DESIREE B. MOORE REVOCABLE) **APPROVAL OF SERVICE PAYMENTS**
TRUST; TRUSTEES OF THE WILLIAM E.)
AND DESIREE B. MOORE REVOCABLE) Date: April 22, 2010
TRUST; CIG ESOP PLAN COMMITTEE;) Time: 2:00 p.m.
NORTH STAR TRUST COMPANY;) Courtroom: 2, 4th Floor
DESIREE B. MOORE REVOCABLE TRUST;) Judge: Hon. Claudia Wilken
WILLIAM E. MOORE MARITAL TRUST;)
WILLIAM E. MOORE GENERATION-)
SKIPPING TRUST; and DESIREE MOORE,)
BOTH IN HER INDIVIDUAL CAPACITY)
AND AS TRUSTEE OF THE WILLIAM E.)
AND DESIREE B. MOORE REVOCABLE)
TRUST'S SUCCESSOR TRUSTS NAMED)
ABOVE,)
Defendants.)
28

1 NOTICE IS HEREBY GIVEN that on April 22, 2010, at 2:00 p.m., or as soon thereafter
2 as the matter may be heard in the above-entitled Court, Plaintiffs Thomas Fernandez, Lora Smith,
3 and Tosha Thomas (“Class Plaintiffs”) will and hereby do move the Court as follows:

4 1. To grant final approval of the Stipulation and Agreement of Settlement
5 (“Settlement” or “Settlement Agreement”) between Class Plaintiffs, on behalf of themselves and
6 the Class (as certified by the Court’s order dated June 26, 2008) and Defendant North Star Trust
7 Company (“NSTC”), as well as the Moore Trust Defendants and the KMH Defendants
8 (collectively the “Settling Parties”), by and through their respective counsel.

9 2. To approve an award of attorneys’ fees and reimbursement of litigation costs to
10 Class Counsel.

11 3. To approve the service payment of \$5,000 each to the Class Plaintiffs.

12 This motion is based on the Memorandum of Points and Authorities filed herewith and in
13 support of this Motion, the Declarations of Todd Jackson, Peter Rukin and Loree Kovach in
14 support of this Motion, the executed Settlement Agreement preliminarily approved by the Court
15 on January 22, 2010, and all other papers filed in this action.

16
17 Dated: March 18, 2010

Respectfully submitted,

18 LEWIS, FEINBERG, LEE,
19 RENAKER & JACKSON, P.C.
20
By: /s/ Todd Jackson
Todd Jackson

21
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28

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Plaintiffs Thomas Fernandez, Lora Smith, and Toshia Thomas, on behalf of themselves and the class of all participants in the K-M Industries Holding Co., Inc. Employee Stock Ownership Plan (“ESOP”), seek final approval of a proposed settlement of their claims against Defendant North Star Trust Company (“NSTC”). The settlement agreement (“Settlement”) resolves the named Plaintiffs’ and the Class Members’ stated ERISA claims against NSTC, in exchange for the payment by NSTC of \$15,000,000. See Settlement, attached to the Preliminary Approval Order as Exh. A (Dkt. 390). In addition, the Moore Trust Defendants and KMH Defendants have executed the settlement agreement and have entered into the releases set forth therein. *See id.* at 18.

This settlement is “fair, reasonable, and adequate.” See Fed. R. Civ. P. 23(e); see also *Class Plaintiffs v. City of Seattle*, 955 F.2d 1268, 1291 (9th Cir. 1992); *Glass v. UBS Financial Services, Inc.*, 2007 WL 221862 at *3 (N.D. Cal. Jan. 26, 2007). Among the relevant factors indicating such fairness and reasonableness are: (1) the settlement is commensurate with the strength of the Plaintiffs’ case, and \$15 million falls well within the range of reasonableness given the risk, expenses, and complexity of further litigation; (2) sufficient discovery and investigation have been conducted to enable Class Counsel to evaluate the claims and defenses in the action and to recommend this settlement; and (3) of the approximately 3,700 Class Members, not one has objected to the Settlement as of the date of this filing.¹ See, e.g., *Glass*, 2007 WL 221862 at *3-5. The Court should therefore grant final approval.

22 In addition, Class Counsel seek approval of an attorney's fee award of \$3,750,000, which
23 represents 25 percent of the Settlement Amount, this Circuit's benchmark for awards from a
24 common fund. *See Vizcaino v. Microsoft Corp.*, 290 F.3d 1043, 1047 (9th Cir. 2002). The
25 requested award is fair, reasonable, and appropriate under the common fund doctrine. *See Six*
26 *Mex. Workers v. Ariz. Citrus Growers*, 904 F.2d 1301, 1311 (9th Cir. 1990).²

²⁷ ²⁸ ¹ Any objections were required to be postmarked by March 18, 2010. If any objections are later received by Class Counsel or the Settlement administrator, they will be forwarded to the Court.

²⁸ received by Class Counsel or the Settlement administrator, they will be forwarded to the Court.
² The Court's approval of the Settlement is not contingent on its approval of Class Counsel's
PLAINTIFFS' MOTION FOR FINAL APPROVAL OF SETTLEMENT
[CASE NO. C 06-07339 CWL]

1 **II. BACKGROUND**

2 **A. The Claims**

3 Plaintiffs filed this class action lawsuit on November 29, 2006. The operative complaint,
 4 the Second Amended Complaint (Corrected), was filed on January 18, 2008. Plaintiffs brought
 5 claims against the KMH Defendants,³ the Moore Trust Defendants,⁴ and NSTC for violations of
 6 the Employee Retirement Income Security Act of 1974, as amended (“ERISA”), including claims
 7 for prohibited transactions and breach of fiduciary duty. Plaintiffs requested injunctive,
 8 declaratory, and monetary relief.

9 Plaintiffs reached a settlement agreement with the KMH and Moore Trust Defendants on
 10 October 30, 2008, wherein the KMH and Moore Trust Defendants paid \$40 million in return for a
 11 release of claims against them. The Court granted final approval of that settlement on May 8,
 12 2009. *See Order*, Dkt. No. 299. The claims against the KMH and Moore Trust Defendants arose
 13 from the October 13, 1998 sale of 33,745,455 shares of KMH Series P-B stock (tracking the
 14 performance of Kelly-Moore Paint Company, Inc., a KMH subsidiary) to the KMH Employee
 15 Stock Ownership Plan (“ESOP”), for \$232 million, and the October 18, 1999 sale of 8,400,000
 16 shares of KMH Series I-B stock (tracking the performance of California Capital Insurance
 17 Company, now renamed Capital Insurance Group, also a KMH subsidiary) to the ESOP for \$55
 18 million. Because KMH is not a publicly-traded company, valuation firms prepared valuation
 19 reports for the 1998 and 1999 transactions. Plaintiffs alleged that the valuations were not done
 20 properly because, among other things, the valuations failed to consider the effect of the asbestos
 21 litigation pending against Kelly-Moore Paint on the value of the stock, and that the share price in
 22 both transactions was too high. The KMH and Moore Trust Defendants denied these allegations.

23 application for attorneys’ fees. The Settlement provides that “[t]he substance of Class Counsel’s
 24 application for attorneys’ fees and costs is not part of this Stipulation, and is to be considered
 25 separately from the Court’s consideration of the fairness, reasonableness, adequacy, and good
 26 faith of the settlement of the Action.” *See Preliminary Approval Order*, Exhibit A (Dkt. 390).

27 ³ The KMH Defendants are K-M Industries Holding Co., Inc., K-M Industries Holding Co., Inc.
 28 ESOP Plan Committee, and CIG ESOP Plan Committee.

29 ⁴ The Moore Trust Defendants are the William E. and Desiree B. Moore Revocable Trust, the
 30 Trustees of the William E. and Desiree B. Moore Revocable Trust, the Desiree B. Moore
 31 Revocable Trust, the William E. Moore Marital Trust, the William E. Moore Generation-
 32 Skipping Trust, and Desiree Moore, both in her individual capacity and as trustee of the William
 33 E. and Desiree B. Moore Revocable Trust’s successor trusts named above.

1 The claims against the Moore Trust and KMH Defendants are no longer at issue in this case.

2 As for the claims against NSTC, Plaintiffs allege that NSTC breached its fiduciary duties
 3 after it was appointed as successor trustee to the ESOP in 2003 by failing to take appropriate steps
 4 to investigate and remedy breaches of fiduciary duty by Mr. Moore and his co-fiduciaries at the
 5 time of the original transactions. North Star denies these allegations.

6 **B. Discovery and Motion Practice**

7 Class Counsel has conducted a thorough investigation into the facts of this action during
 8 over three years of hard-fought litigation, and has diligently pursued Plaintiffs' and the Class'
 9 claims against NSTC. During fact discovery, Plaintiffs propounded multiple discovery requests
 10 to Defendants, including Requests for Production, Requests for Admission, and Interrogatories.
 11 During fact discovery, Defendants produced, and Class Counsel reviewed, hundreds of thousands
 12 of pages of documents responsive to Plaintiffs' discovery requests. Further, Class Counsel
 13 deposed eleven witnesses, excluding experts, who had knowledge of facts relevant to Plaintiffs'
 14 claims, including three corporate representatives (one for each of KMH's subsidiaries, and one
 15 for North Star), and defended the depositions of the three named Plaintiffs. Class counsel also
 16 filed several motions to compel discovery. *See Declaration of Todd Jackson In Support of*
 17 *Plaintiffs' Motion for Final Approval ("Jackson Dec.") ¶¶ 14-15.*

18 After the close of fact discovery, Plaintiffs moved for class certification. Dkt. 103. The
 19 Court granted class certification and appointed class counsel by order dated June 26, 2008. Dkt.
 20 145. The parties fully briefed Defendants' motions for summary judgment on the statute of
 21 limitations, but Plaintiffs settled their claims with the KMH Defendants and the Moore Trust
 22 Defendants prior to the hearing on those motions. *See Jackson Dec. ¶ 14.* The Court denied
 23 NSTC's Motion for Summary Judgment on the statute of limitations on November 14, 2008.
 24 Dkt. 237.

25 NSTC and Plaintiffs filed cross-motions for judgment on the pleadings on the issue of
 26 whether NSTC was indemnified by the KMH and Moore Trust Defendants for any liability
 27 arising from Plaintiffs' claims. Dkts. 274, 304. The Court granted Plaintiffs' motion and denied
 28 NSTC's motion on August 21, 2009. Dkt. 330. NSTC requested reconsideration of that decision,

1 and the Court denied its request. Dkts. 334, 339. After engaging in expert discovery – including
 2 exchange of expert reports and rebuttal expert reports and depositions of all five experts – NSTC
 3 moved for summary judgment on the merits. Dkt. 341.

4 After the motion was fully briefed but prior to the hearing on the motion, Plaintiffs and
 5 NSTC participated in a mediation with Layn Phillips, a former federal judge, on November 18,
 6 2009.⁵ Jackson Dec. ¶ 17. On November 25, 2009, with Mr. Phillips's assistance, the parties
 7 entered into a short-form settlement agreement. Plaintiffs and NSTC executed a more formal
 8 Settlement Agreement on December 23, 2009. Plaintiffs moved for preliminary approval of this
 9 Settlement on January 4, 2010.

10 Following Plaintiffs' Motion for Preliminary Approval, which was unopposed, the Court
 11 issued an order (1) preliminarily approving the proposed settlement, (2) approving the form and
 12 content of notice to class members, (3) directing the mailing of notice, and (4) scheduling the
 13 final fairness hearing. Dkt. 390.

14 **III. SETTLEMENT**

15 **A. Terms of the Settlement Agreement**

16 The terms of the Proposed Settlement Agreement are set forth in the Stipulation and
 17 Agreement of Settlement, a true and correct copy of which was attached to the Order granting
 18 preliminary approval as Exhibit A. Dkt. 390. In short, the Settlement Agreement provides for a
 19 payment of \$15,000,000 by NSTC, inclusive of payments to the Class, attorneys' fees, and
 20 incentive awards, in return for a release that extinguishes all remaining claims in this Action, as
 21 well as all other claims and cross-claims that arise out of the facts, transactions and allegations in
 22 the Action that were or could have been asserted in this lawsuit.

23 The Settlement Amount is inclusive of attorneys' fees, which shall not exceed 25% of the
 24 total Settlement Amount (\$3,750,000), and attorneys' costs and expenses, including settlement
 25 administration, which shall not exceed \$200,000. *See id.*, § 4(a). The Settlement Amount is also
 26

27 ⁵ In addition to the first mediation which resulted in the settlement with the KMH and Moore
 28 Trust Defendants (which all parties participated in), Plaintiffs and NSTC engaged in a prior
 mediation with Gary McGowan in July 2009; however, that mediation did not result in a
 settlement between Plaintiffs and NSTC. Jackson Dec. ¶ 16.

1 inclusive of incentive awards which are sought for Class Plaintiffs Fernandez, Thomas, and Smith
 2 for their service to the Class, in an amount of \$5,000 per person. *See id.*, § 4(b). The remainder
 3 of the Settlement Amount, which will be at least \$11,035,000, will be paid into the ESOP for the
 4 benefit of Plaintiffs.

5 In exchange for this valuable consideration, the Class releases all claims against NSTC
 6 that arise out of the facts, transactions and allegations in this Action. *See id.*, §§ 1(u), 5(a). The
 7 Settlement also provides that the parties release each other from all claims and cross claims
 8 arising out of or related to the Action that were or could be asserted against any other party to the
 9 Action. *See id.*, §§ 1(c), 5(b). Additionally, the KMH Defendants and Moore Trust Defendants
 10 release all claims and cross claims arising out of the Action that were or could be asserted by
 11 those Defendants against NSTC. *See id.*, §§ 1(w), 5(c). Finally, the Class Plaintiffs, Class
 12 Counsel, and Class Plaintiffs and Class Members acting for the benefit of the ESOP and the Class
 13 Members themselves, on one hand, and the KMH and Moore Trust Defendants, on the other,
 14 release one another from any claims arising out of the assignment of claims set forth in Sections
 15 3(c) and 3(d) of the earlier settlement agreement that were or could be asserted against one
 16 another. *See id.*, §§ 1(b), 5(d). Class Members were not entitled to opt out of this Settlement.
 17 *See id.*, § 7.

18 As set forth in Section 3 of the Settlement Agreement, K-M Industries Holding Co., Inc.
 19 retained, and NSTC paid for, an Independent Fiduciary to review the Settlement in light of
 20 Prohibited Transaction Exemption 2003-39, 68 Fed. Reg. 75632 (2003). As discussed below, the
 21 Independent Fiduciary has determined that the releases set forth in the Settlement Agreement
 22 meet the requirements of the Prohibited Transaction Exemption. The Independent Fiduciary also
 23 provided a release of the “Settled Claims.” Dkt. 390, Exh. A at § 3(c). In addition, the
 24 Independent Fiduciary will determine the allocation of the settlement funds among the ESOP
 25 participants, according to the terms of the ESOP Plan.

26 **B. Notice**

27 Pursuant to the Court’s January 22, 2010, Order, the Notice was mailed to Class Members
 28 on February 1, 2010. *See* Declaration of Loree Kovach (“Kovach Decl.”) ¶ 4. When Notices were

1 returned undeliverable, Class Members were traced and the Notices were re-mailed. *Id.* ¶¶ 5-6.

2 No class member has objected to the proposed settlement as of the date of this filing. *Id.* ¶ 7.

3 **IV. FINAL APPROVAL OF SETTLEMENT IS APPROPRIATE**

4 The law favors settlement, particularly in class actions and other complex cases where
 5 substantial resources can be conserved by avoiding the time, cost, and rigors of formal litigation.
 6 *Van Bronkhorst v. Safeco Corp.*, 529 F.2d 943, 950 (9th Cir. 1976). Final approval of a proposed
 7 class action settlement will be granted where it is established that the proposed settlement is “fair,
 8 reasonable, and adequate.” Fed. R. Civ. P. 23(e)(2). In determining whether to grant final
 9 approval, the Court does not “reach any ultimate conclusions on the contested issues of fact and
 10 law which underlie the merits of the dispute, for it is the very uncertainty of outcome in litigation
 11 and avoidance of wasteful and expensive litigation that induce consensual settlements.” *Class*
 12 *Plaintiffs*, 955 F.2d at 1291 (quoting *Officers for Justice v. Civil Serv. Comm'n*, 688 F.2d 615,
 13 625 (9th Cir. 1982)).

14 In the Ninth Circuit, the district court determines the fairness, reasonableness and
 15 adequacy of the settlement through a balancing test that considers
 16 several factors which may include, among others, some or all of the following: the
 17 strength of plaintiffs’ case; the risk, expense, complexity, and likely duration of
 18 further litigation; the risk of maintaining class action status throughout the trial;
 19 the amount offered in settlement; the extent of discovery completed, and the stage
 of the proceedings; the experience and views of counsel; the presence of a
 governmental participant; and the reaction of the class members to the proposed
 settlement.⁶

20 *Id.* The relative importance of any particular factor will depend upon the nature of the claims, the
 21 types of relief sought, and the unique facts and circumstances presented by the individual case.

22 *Id.* Furthermore, “[n]ot all of these factors will apply to every class action settlement. Under
 23 certain circumstances, one factor alone may prove determinative in finding sufficient grounds for
 24 court approval.” *Nat'l Rural Telecomm. Coop. v. DIRECTV, Inc.*, 221 F.R.D. 523, 525-62 (C.D.
 25 Cal. 2004) (citing *Torrisi v. Tucson Elec. Power Co.*, 8 F.3d 1370, 1376 (9th Cir. 1983)).

26 As explained below, the relevant factors support granting final approval to this Settlement.

27
 28⁶ As no governmental participant is involved, this factor is not discussed below.

1 A. **The \$15 Million Settlement Is Fair Considering the Strength of Plaintiffs'**
 2 **Case, the Risks and Complexity Involved, the Stage of the Proceeding, and**
 3 **the Amount Offered in Settlement.**

4 Among the factors that support final approval of this settlement are the strength of
 5 Plaintiffs' case, the risks and complexity of continued litigation, the stage of the litigation, and the
 6 amount offered in settlement. While Plaintiffs believe they have a strong case and would
 7 ultimately prevail, NSTC vigorously denied that it breached its fiduciary duties, and if it had not
 8 prevailed on its motion for summary judgment, the case would have proceeded to trial. NSTC
 9 and its experts disputed the amount of damages payable to the Class, or that any damages were
 10 payable at all. In addition, NSTC indicated its intention to appeal this Court's rulings on the
 11 statute of limitations and indemnification issues. Continuing with the litigation against NSTC
 12 thus poses risks and uncertainties, and would involve significant expenses and delays. In
 13 comparison, the Settlement commits NSTC to pay \$15 million which will compensate Class
 14 Members now.

15 It is well accepted that a settlement is evaluated in light of the risks and costs of litigation.
 16 “The Court shall consider the vagaries of litigation and compare the significance of immediate
 17 recovery by way of the compromise to the mere possibility of relief in the future, after protracted
 18 and expensive litigation.” *Nat'l Rural Telecomm.*, 221 F.R.D. at 526. Thus, “unless the
 19 settlement is clearly inadequate, its acceptance and approval are preferable to lengthy and
 20 expensive litigation with uncertain results.” *Id.* (quoting 4 A. Conte 7 H. Newberg, *Newberg on*
Class Actions § 11:50 at 155 (4th ed. 2002)).

22 The relief obtained is substantial, and well within the range of reasonableness. Assuming
 23 that the Court awards attorneys’ fees of 25 percent of the Settlement Fund, litigation costs of up
 24 to \$200,000⁷ (including anticipated future costs relating to the Final Approval hearing and
 25

26 ⁷ As of March 27, 2009, the date of their Motion for Attorneys’ Fees and Costs in connection with
 27 the first settlement in this case, Plaintiffs had incurred \$124,193.65 in costs. The Court approved
 28 an award of \$155,000 in costs. Dkt. 300. Plaintiffs’ costs from March 28, 2009 through the
 present are \$177,612.88. See Jackson Dec. ¶¶ 26-27 and Exh. B. Plaintiffs anticipate that the
 costs of settlement administration will be approximately \$20,000 to \$25,000. Accordingly,
 Plaintiffs request that the Court approve reimbursement of costs of up to \$200,000.

1 settlement administration process), and the Class Representative service payments of \$5,000
 2 each, the Net Settlement Fund will be \$11,035,000, to be divided pro rata among approximately
 3 3,700 class members. This results in an average (mean) settlement of approximately \$2,930 per
 4 class member. Depending on each individual class member's ESOP account and whether the
 5 class member worked for Kelly-Moore Paint or CIG, the payment to that individual class member
 6 may be substantially higher or lower than \$2,930; \$2,930 is simply the average distribution.

7 **B. The Settlement Reflects the Informed Views of Experienced Counsel and Is**
 8 **the Product of Serious, Arm's-Length Negotiations Conducted After**
 Extensive Discovery and Investigation.

9 “Great weight” is accorded to the recommendation of counsel, who are most closely
 10 acquainted with the facts of the underlying litigation.” *Nat'l Rural Telecomm.*, 221 F.R.D. at 528
 11 (quotations and citations omitted). For more than three years, experienced Class Counsel has
 12 vigorously litigated the claims asserted against Defendants through extensive written discovery
 13 and depositions as well as motion practice. Jackson Dec. ¶¶ 14-15, 23. Given the well developed
 14 record created during almost three years of hard fought litigation, Counsel has a solid basis upon
 15 which to assess the risks faced in the future. Among the risks of ongoing litigation were risks
 16 inherent in NSTC’s pending motion for summary judgment on the merits, liability risks at trial,
 17 risks that the damages owed the class (essentially the amount of overpayment for company stock)
 18 could be diminished at trial, apportionment risks, and risks regarding liability, damages, and
 19 indemnification on appeal. Three years of litigation has allowed Counsel to assess the strengths
 20 and weaknesses of the claims against NSTC and determine that the benefits of the proposed
 21 Settlement outweigh the benefits that likely could be achieved through further litigation of this
 22 case. Jackson Dec. ¶ 20.

23 The Settlement resulted only after arm's-length settlement negotiations that were
 24 conducted after rigorous discovery regarding the merits and damages of the disputed claims, and
 25 under the supervision of experienced mediator Layne Phillips. Jackson Dec. ¶¶ 14-17. The final
 26 mediation with Layne Phillips was the third formal mediation between these parties, lasted a full
 27 day, and was followed by protracted negotiations thereafter. Jackson Dec. ¶¶ 16-17.⁸ The

28 ⁸ Plaintiffs and NSTC previously mediated on October 18, 2008, with Anthony Piazza, and on
 PLAINTIFFS' MOTION FOR FINAL APPROVAL OF SETTLEMENT
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1 proposed Settlement is the non-collusive product of hard-fought litigation. “A settlement
 2 following sufficient discovery and genuine arm’s-length negotiation is presumed fair.” *Browning*
 3 *v. Yahoo, Inc.*, 2006 WL 3826714 at *8 (N.D. Cal. Dec. 27, 2006) (quoting *Nat’l Rural*
 4 *Telecomm.*, 221 F.R.D. at 528).

5 In sum, the factors relating to the views of counsel, as well as the depth of discovery and
 6 the arm’s-length nature of settlement, support settlement in this case.

7 **C. The Lack of Opposition By the Class and the Independent Fiduciary’s**
 8 **Approval Support Approval of the Settlement.**

9 As described above, pursuant to the Court’s preliminary approval order, the Claims
 10 Administrator mailed the Notice of Proposed Partial Class Action Settlement on February 1,
 11 2010, to all putative Class Members identified through the data provided by KMH. Jackson Dec.
 12 ¶ 18; Kovach Dec. ¶ 4.

13 As the notice states, the deadline to object to the Settlement was March 18, 2010. As of
 14 the date of this filing, the Claims Administrator has received no objections to the settlement.
 15 Jackson Dec. ¶ 18; Kovach Dec. ¶ 7. The absence of objections demonstrates support for the
 16 Settlement Agreement. ““The reactions of the members of a class to a proposed settlement is a
 17 proper consideration for the trial court.”” *Nat’l Rural Telecomm.*, 221 F.R.D. at 528 (quoting 5
 18 *Moore’s Federal Practice* § 23.85[2][d]). Here, the fairness, reasonableness, and adequacy of the
 19 settlement are well supported by the absence of any objections to the Settlement, as well as the
 20 factors discussed above.

21 Moreover, Department of Labor regulations establishing a class exemption under ERISA
 22 § 408, 29 U.S.C. § 1108, require that where a plan releases claims against its fiduciaries, an
 23 independent fiduciary must be engaged by the plan to review the settlement and determine
 24 whether the settlement constitutes reasonable compensation for the plan’s claims. Prohibited
 25 Transaction Exemption 2003-39 enables a class to settle and release prohibited transaction claims
 26 against a party in interest in exchange for consideration given by, or on behalf of, a party in
 27 interest to the plan in settlement of the claims. 68 Fed. Reg. 75632 (2003). To meet the

28 July 9, 2009, with Gary McGowan. Jackson Dec. ¶ 16.

PLAINTIFFS’ MOTION FOR FINAL APPROVAL OF SETTLEMENT
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1 exemption, a fiduciary (such as an independent fiduciary hired for this purpose) must determine
 2 that the settlement is “reasonable given the likelihood of full recovery, the costs and risks of
 3 litigation, and the value of claims foregone.” *Id.* Here, that review was performed by Evercore
 4 Trust Company, N.A. (“Evercore”). On March 17, 2010, counsel for NSTC notified Class
 5 Counsel that she had received from Evercore a release on behalf of the Plan and a determination
 6 that the class exemption’s requirements have been met. Jackson Dec. ¶ 19. The independent
 7 fiduciary’s approval provides further assurance of the fairness and reasonableness of the
 8 settlement.

9 **D. The Payment to the Named Representatives for Their Service to the Class Is**
Reasonable and of the Type Routinely Awarded.

10 The payment of \$5,000 each to the Class Representatives is intended to recognize the time
 11 and effort they expended on behalf of the Class. Indeed, “[c]ourts routinely approve incentive
 12 awards to compensate named plaintiffs for the services they provided and the risks they incurred
 13 during the course of the class action litigation.” *Ingram v. The Coca-Cola Co.*, 200 F.R.D. 685,
 14 694 (N.D. Ga. 2001) (quoting *In re S. Ohio Correctional Facility*, 175 F.R.D. 270, 272 (S.D.
 15 Ohio 1997)). In *Van Vranken v. Atl. Richfield Co.*, 901 F. Supp. 294, 299 (N.D. Cal. 1995), the
 16 court approved incentive awards of \$50,000 to the named plaintiff in recognition of the services
 17 he provided to the class by participating in numerous telephone conferences and meetings with
 18 class counsel, attending several hearings, and having his deposition taken, as well as testifying at
 19 trial. In this case, the Class Representatives have similarly performed important services for the
 20 benefit of the class: they provided information regarding the ESOP during interviews, produced
 21 relevant documents, sat for depositions, assisted with the mediations, and worked with Plaintiffs’
 22 counsel throughout the case.⁹ See *Van Vranken*, 901 F. Supp. at 299; see also *Ingram*, 200
 23 F.R.D. at 694 (approving incentive awards of \$300,000 to each named Plaintiff in recognition of
 24 the services they provided to the class). No member of the class has objected to payment of
 25 incentive awards to the Class Representatives. Kovach Dec. ¶ 7. Accordingly, the payment to the
 26

27
 28

⁹ In addition, the Class Representatives have provided a broader release to NSTC: in their
 individual capacities, they have released any and all claims, known or unknown, against NSTC.

1 Class Representatives is appropriate and justified as part of the overall Settlement, in light of their
 2 services to and risks taken on behalf of the Class. Jackson Dec. ¶ 21.

3 **V. THE FEE MOTION SHOULD BE GRANTED**

4 Class Counsel also request an award of fees for their service to the class.¹⁰ Class
 5 Counsel's requested fee award is fair, reasonable, and appropriate under well-established
 6 principles of recovery from a common fund. *Six Mex. Workers*, 904 F.2d at 1311 (citing *Blum v.*
 7 *Stenson*, 465 U.S. 886, 900 n.16 (1984)). "It is well established that 'a private plaintiff, or his
 8 attorney, whose efforts create, discover, increase or preserve a fund to which others also have a
 9 claim is entitled to recover from the fund the costs of his litigation, including attorneys' fees.'" *In*
 10 *re Omnivision Tech., Inc.*, 2007 WL 4293467, at *8 (N.D. Cal. 2007) (quoting *Vincent v. Hughes*
 11 *Air West. Inc.* 557 F.2d 759, 769 (9th Cir. 1977)).

12 In *Blum*, 465 U.S. at 900 n.16, the Supreme Court stated that reasonable fees under the
 13 common fund doctrine are determined as a percentage of the fund. The Ninth Circuit has
 14 likewise approved the use of fund percentages as a reasonable manner to determine attorneys'
 15 fees. See *Vizcaino*, 290 F.3d at 1047; *Six Mex. Workers*, 904 F.2d at 1311; see also *Omnivision*,
 16 2007 WL 4293467, at *8 (observing that "use of the percentage method in common fund cases
 17 appears to be dominant"). In the Ninth Circuit, 25 percent of the common fund is the
 18 "benchmark" for an attorneys' fees award. See *Paul, Johnson, Alston & Hunt v. Graulty*, 886
 19 F.2d 268, 272 (9th Cir. 1989). Here, the requested award of \$3,750,000 meets the Ninth Circuit's
 20 benchmark for an award of attorneys' fees under the percentage of the common fund method.
 21 Additionally, reimbursement of litigation costs of up to \$200,000 incurred in pursuing this matter
 22 is reasonable, as explained below.

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24 //

25 //

26 //

27 ¹⁰ Class Counsel's request for an award fees is separate from the request for final approval of the
 28 Settlement and approval of the Settlement is not contingent on approval of the fee request. See
 Dkt. 390, Exh. A at § 4(a).

1 **A. Counsel Are Entitled to an Award of Attorneys' Fees Out of the Common**
 2 **Fund.**

3 **1. The Equitable Common Fund Doctrine Applies When, as in This Case,**
 4 **the Litigation Has Recovered a Certain and Calculable Fund on Behalf**
 of a Group of Beneficiaries.

5 It is a long-standing principle that when counsel's efforts result in the creation of a
 6 common fund that benefits plaintiffs and unnamed class members, counsel have an equitable right
 7 to be compensated from that fund as a whole for their successful efforts in creating it. *See, e.g.,*
 8 *Boeing Co. v. Van Gemert*, 444 U.S. 472, 478 (1980) (stating that the Court "has recognized
 9 consistently that a litigant or a lawyer who recovers a common fund . . . is entitled to a
 10 reasonable attorney's fee from the fund as a whole"); *Central R.R. & Banking Co. v. Pettus*, 113
 11 U.S. 116 (1885) (recognizing common fund doctrine); *Staton v. Boeing Co.*, 327 F.3d 938, 967
 12 (9th Cir. 2003) (same).

13 The common fund doctrine rests on the understanding that attorneys should normally be
 14 paid by their clients, and that when the attorneys' unnamed class member "clients" have no
 15 express retainer agreement, it would result in unjust enrichment not to pay attorneys' fees out of
 16 the common fund. *Boeing*, 444 U.S. at 478.

17 In this case, the litigation against NSTChas resulted in a Settlement Fund of \$15,000,000
 18 (less attorney's fees and costs) to be distributed to all participants in the ESOP. Because none of
 19 these individuals has paid Plaintiffs' counsel fees for their efforts during the litigation, equity
 20 requires them to pay a fair and reasonable fee, based on what the market would traditionally
 21 require, no less than if they had hired private counsel to litigate their cases individually. *See id.* at
 22 479-81.

23 **2. The Fee Award Should Be Calculated as a Percentage of the Common**
 24 **Fund.**

25 When contingency fee litigation has produced a common fund, the Ninth Circuit has held
 26 that it is appropriate to calculate a reasonable fee by awarding a percentage of the total fund. *See,*
 27 *e.g., Six Mex. Workers*, 904 F.2d at 1311 (common fund fee is generally "calculated as a
 28 percentage of the recovery"); *see also Paul, Johnson, Alston & Hunt*, 886 F.2d at 272 .

1 The percentage of the fund method is appropriate for a number of well-recognized
 2 reasons. Importantly, the percentage method accomplishes fee spreading in a manner that
 3 comports with the legal marketplace, where counsel's success is frequently measured in terms of
 4 the results achieved. *See Swedish Hosp. Corp. v. Shalala*, 1 F.3d 1261, 1269 (D.C. Cir. 1993) (in
 5 common fund cases "the monetary amount of the victory is often the true measure of [counsel's]
 6 success"). By assessing the amount of the fee in terms of the amount of the benefit conferred on
 7 the class, the percentage method "more accurately reflects the economics of litigation practice"
 8 which, "given the uncertainties and hazards of litigation, must necessarily be result-oriented." *Id.*
 9 (internal quotation marks and citation omitted).

10 Further, when clients do not pay an ongoing hourly fee to their counsel, they typically
 11 negotiate an agreement in which counsel's fee is based upon a percentage of any recovery. The
 12 percentage of the fund approach mirrors this aspect of the market and, accordingly, reflects the
 13 fee that would have been negotiated by the class members in advance, had such negotiations been
 14 feasible, given the prospective uncertainties and anticipated risks and burdens of the litigation.
 15 *See, e.g., Paul, Johnson, Alston & Hunt*, 886 F.2d at 271.

16 The percentage approach helps incentivize highly qualified attorneys to bring large,
 17 complex class actions, even though it is impossible in such cases to negotiate a fee with the
 18 unnamed class members in advance. Basing the common fund fee award on a percentage of the
 19 fund also encourages counsel to spend time efficiently and to focus on maximizing the size of the
 20 class's recovery, rather than their own lodestar hours. *Swedish Hospital*, 1 F.3d at 1269. Finally,
 21 the percentage method is far easier for courts to calculate than any alternative method. *Id.; In re*
 22 *Activision Sec. Litig.*, 723 F. Supp. 1373, 1378 (N.D. Cal. 1989).

23 In light of these benefits, courts have resoundingly approved the percentage of the fund
 24 method to calculate a reasonable fee award in common fund cases. *See Activision*, 723 F. Supp.
 25 at 1378 (collecting cases and describing the benefits of a percentage method over the lodestar
 26 method for awarding attorneys' fees in common fund settlements). Thus, in this case, counsels'
 27 common fund fees should be determined as a percentage of the total fund that will be distributed
 28 to the class.

1 **3. The Requested Fee Award Meets the 25-Percent Benchmark**
 2 **Established by the Ninth Circuit.**

3 In determining what constitutes a fair and reasonable percentage of a settlement fund for
 4 purposes of calculating common fund fees, the Ninth Circuit has stated that courts look to a
 5 “benchmark” percentage of 25 percent of the total fund. *Vizcaino*, 290 F.3d at 1047; *Six Mex.*
 6 *Workers*, 904 F.2d at 1311; *Paul, Johnson, Alston & Hunt*, 886 F.2d at 272; *see also Morganstein*
 7 *v. Esber*, 768 F. Supp. 725, 728 (C.D. Cal. 1991) (stating that “*Paul, Johnson* establishes 25
 8 percent as the benchmark for common fund cases”).¹¹

9 **B. The Requested Fee Award Is Fair and Reasonable.**

10 The requested award of 25 percent of the common fund is justified by the financial risks
 11 undertaken by Class Counsel in this litigation. Counsel accepted and litigated this class action
 12 solely on a contingency fee basis. At the outset of this litigation, there was no guarantee that
 13 Counsel would be paid for their time, and although there was a fee award associated with the first
 14 settlement, Class Counsel was not guaranteed to actually receive it. Moreover, there was no
 15 guarantee that Counsel would be paid for the continued litigation against North Star. As
 16 described herein, and as borne out by litigation to date, the case involved significant risk and
 17 complexity.

18 The fairness of this fee award is further supported by the high quality of Class Counsel’s
 19 legal representation. The efforts expended by Class Counsel in this case are described above and
 20 are described in the accompanying Declarations of Todd Jackson and Peter Rukin. As these

21 ¹¹ In approving an award of 28 percent of the \$96,885,000 settlement fund, the *Vizcaino* court
 22 surveyed attorneys’ fees awards in so-called “megafund” cases—that is, common fund
 23 settlements of \$50-200 million—found in the Westlaw ALLCASES database and Class Action
 24 Reports’ attorneys’ fees section from Jan. 1, 1996 through Dec. 31, 2001. *Vizcaino*, 290 F.3d at
 25 1046 n.1, & Appendix. Even where the common funds fell into this megafund range, the
 26 *Vizcaino* court noted that a majority of fee awards were “clustered in the 20-30 percent range.”
Id. at 1050 n.4, & Appendix. In common fund settlements of less than \$50 million, such as this
 27 one, courts have awarded a higher percentage of the common fund as attorneys’ fees. *See, e.g., In*
re Pacific Enterprises Sec. Litig., 47 F.3d 373, 379 (9th Cir. 1995) (affirming an award equal to
 28 33 percent of the common fund); *In re Activision*, 723 F. Supp. at 1375 (awarding plaintiffs’
 counsel 32.8 percent of the common fund created to settle the litigation); *In re Ampicillin*
Antitrust Litig., 526 F. Supp. 494, 498 (D.D.C. 1981) (awarding 45 percent of \$7.3 million
 settlement fund); *Beech Cinema, Inc. v. Twentieth-Century Fox Film Corp.*, 480 F. Supp. 1195,
 1199 (S.D.N.Y. 1979), *aff’d* 622F.2d 1106 (2nd Cir. 1980) (approximately 53 percent of
 settlement fund awarded).

1 declarations reflect, Class Counsel's diligent, efficient, and creative pursuit of this matter
 2 positioned Plaintiffs to successfully settle this case for \$15,000,000, and so achieve redress for the
 3 entire Class, and thus avoid the inevitable expense and risk attendant to protracted litigation. *See*
 4 *generally* Jackson Dec. ¶¶ 13-17; Rukin Dec ¶ 8.

5 Aside from the general risks and complexity associated with protracted class action
 6 litigation, this case had specific risks and complexity. Litigation involving ESOPs in closely held
 7 companies is a complex sub-area within the already complex area of ERISA class action
 8 litigation. Further, the protracted litigation against North Star raised issues about the scope of
 9 ERISA's indemnification prohibition, the scope of successor trustees' fiduciary duties, and proper
 10 valuation of a closely held company with contingent asbestos liabilities.

11 Finally, the requested amount of attorneys' fees and costs was stated explicitly in the
 12 Notice of Proposed Class Action Settlement. Preliminary Approval Order, Exhibit B (Dkt. 390).
 13 Class Members had until March 18, 2010, to raise any objections. No objections to either the
 14 percentage of the common fund sought as attorneys' fees or to the award of costs sought by Class
 15 Counsel have been received. *See* Kovach Dec. ¶ 7. Courts have observed that the absence of any
 16 objections to the fees and costs requested supports the conclusion that the requested award is fair,
 17 adequate, and reasonable. *See In re Heritage Bond Litig.*, 2005 WL 1594389, at *15 (C.D. Cal.,
 18 June 10, 2005) (citing *Cullen v. Whitman Medical Corp.*, 197 F.R.D. 136, 148-49 (E.D. Pa.
 19 2000); *In re Crazy Eddie Sec. Litig.*, 824 F. Supp. 320, 326-8 (E.D.N.Y. 1993)).

20 Finally, the Independent Fiduciary reviewed Class Counsel's requested attorney's fees and
 21 expressed no objection. Jackson Dec. Jackson Dec. Exh. A.

22 **C. Class Counsel Are Entitled to Recover Costs.**

23 Class Counsel request reimbursement from the fund of out-of-pocket expenses they
 24 incurred in this litigation since final approval of the first settlement. Reimbursement for these
 25 expenses from the common fund is appropriate for the same reasons attorneys' fees should be
 26 paid out of the fund: all beneficiaries should bear their fair share of the costs of the litigation, and
 27 these are the normal costs of litigation that counsel traditionally bill their paying clients. *See* 1
 28 Alba Conte, *Attorney Fee Awards* § 2:8 at 50-51 (3d ed. 2004) ("The prevailing view is that

expenses are awarded in addition to the fee percentage.”)). As one commentator has written,
 [A]n attorney who creates or preserves a common fund by judgment or settlement
 for the benefit of a class is entitled to receive reimbursement of reasonable fees
 and expenses involved. The equitable principle that all reasonable expenses
 incurred in the creation of a fund for the benefit of a class are reimbursable
 proportionately by those who accept benefits from the fund authorizes
 reimbursement of full reasonable litigation expenses as costs of the suit
 Conte, *supra*, § 2.19 (citing *Trustees v. Greenough*, 105 U.S. 527 (1881)). The expenses that may
 be reimbursed from the common fund are not limited to those taxed in a judgment against an
 opponent, but instead, encompass “all reasonable expenses.” *Id.* See also *Harris v. Marhoefer*,
 24 F.3d 16, 19 (9th Cir. 1994) (attorneys may be reimbursed for reasonable out-of-pocket
 expenses that were “incidental and necessary to the representation of those clients”).

Since filing their Motion for Final Approval of the first settlement in this case (on March
 27, 2009), Class Counsel have incurred \$177,612.88 in litigation costs and expenses, and will
 incur additional costs through the conclusion of this matter (specifically, the costs of settlement
 administration are not reflected in the current costs). Jackson Dec. ¶¶ 26-27.¹² These costs
 include deposition-related expenses, expert witness fees, travel expenses for an out-of-town
 expert deposition, photocopying and mailing expenses, and other reasonable litigation-related
 costs including the costs of hiring an expert to assist with damages analysis prior to mediation.
See id. All costs incurred here were necessary to the prosecution of this litigation and would
 normally have been billed to a client paying for counsel’s services on a regular basis. These costs
 are quite reasonable for a case of this duration and complexity and should be compensated in full.
 To provide for additional expenditures in the continued administration of the settlement, Plaintiffs
 hereby request that the Court now approve costs of up to \$200,000 total.

VI. CONCLUSION

For all of the foregoing reasons, Plaintiffs respectfully request that the Court: (1) grant
 final approval of the proposed class action settlement and plan of distribution; (2) approve the
 service payment of \$5,000 to Named Plaintiffs and Class Representatives Thomas Fernandez,

¹² As noted above, in this Motion Plaintiffs request reimbursement only for costs incurred since
 the first settlement in this case (and the corresponding award of costs) was approved. See *supra*
 n.7.

1 Lora Smith, and Tosha Thomas; (3) approve the payment of \$3.75 million as reasonable
2 attorneys' fees and the payment of up to \$200,000 as reasonable costs; (4) reserve jurisdiction for
3 purposes of supervising the implementation, enforcement, construction, and interpretation of the
4 Settlement Agreement; and (5) dismiss all claims with prejudice.

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DATED: March 18, 2010

Respectfully submitted,

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LEWIS, FEINBERG, LEE,
RENAKER & JACKSON, P.C.

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By: /s/ Todd Jackson
Todd Jackson

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